SUBRAMANIAM LAKSHAMANASAMY

v.

DATUK S. SAMY VELLU & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[SUIT NO. 22-50-87]
22 JUNE 1987

CIVIL PROCEDURE: *Ex parte application to discharge interim injunction - Whether interlocutory injunction could be discharged or varied on ex parte application - Sufficient cogency or sufficient urgency - 'MIC' Branch declared as "defunct" - Whether wrongly declared as "defunct" - Membership of Branch Congress shall not be less than 100 - Whether a member can resort to Court proceedings without first referring to Central Working Committee.*

LEGAL PROFESSION: *Counsel gainfully employed as Deputy Speaker of Dewan Rakyat - Question of locus standi in Court - Whether Counsel in contravention of s. 30 Legal Profession Act 1976 - Counsel in possession of valid practising certificate.*

This was an application by the defendants to discharge an interlocutory injunction obtained by the plaintiff against them on 23 May 1987.

The defendants who were members of the Central Working Committee of the Malaysian Indian Congress had declared its Tanjong West Branch as "defunct" when it was discovered that its membership only amounts to 71 whereas under Article 19.12 of the Party's Constitution the membership of the Branch Congress shall not be less than 100. As a result of this declaration the plaintiff alleged that he and other members of the Branch have been deprived from utilising their rights and privileges given by the Party's Constitution.

The plaintiff then applied and was granted an injunction preventing the defendants, their agents or servants from receiving any nomination papers in respect of the nomination of candidates for the Malaysian Indian Congress Penang Branch election. The injunction further restrained the defendants from holding the Penang State Congress election pending the declaration of the status of the Malaysian Indian Congress Tanjong West Branch.

A preliminary objection was also raised by the plaintiff relating to the standing of Mr. Vijandran, Counsel for the defendants. It was submitted by the plaintiff that Mr. Vijandran has no *locus standi* as Counsel by virtue of his being gainfully employed as the Deputy Speaker of the Dewan Rakyat and whether the fact that he is gainfully employed is in contravention with s. 30 of the Legal Profession Act 1976**.**

On the main application, the issue in the plaintiff's writ was whether the defendants were acting within the Party's Constitution when they declared the Malaysian Indian Congress Tanjong West Branch as "defunct" under Article 20.

Held:

[1] An application to discharge or vary an interlocutory injunction can be made *ex parte* if applicants have made out a sufficient case in that the application is supported by sufficiently cogent grounds or in a case of sufficient urgency.

[2] In this case the defendants had made a sufficient case to discharge the interim injunction. The defendants have shown the fact that the membership of the Tanjong West Branch was only 71 after a membership verification exercise was carried out by the defendants and this therefore contravened Article 19.12 of the Party's Constitution as the membership of the Branch Congress shall not be less than 100. The plaintiff had also acted in contravention with the Party's Constitution when he failed to comply with a condition precedent under Article 91 of the Party's Constitution where no member of the Party is allowed to resort to Court proceedings unless and until such matter was referred to the Central Working Committee.

[3] On the preliminary objection, the Court found that the Counsel Mr. Vijandran possessed a valid practising certificate and therefore has an exclusive right to appear and plead in all Courts in this country in accordance with s. 35(1) of the Legal Profession Act 1976.

[4] In the circumstances of the whole case, the Court found the defendants had made a sufficient case for it to discharge the interim injunction and made an order accordingly.

[Injunction discharged.]

Cases referred to:
London City Agency (JCD) Ltd. & Anor. v. Lee & Ors. [1970] 1 Ch 597
Datuk Pasamanickam & Anor. v. Agnes Joseph [1980] 2 MLJ 92

Legislation referred to:
Federal Constitution, arts. 57(1), 58
Legal Profession Act 1976, ss. 30, (1)(c), (3), 35(1)
Rules of the High Court 1980, O. 18 r. 19

For the defendants/applicants - D.P. Vijandran; M/s. D.P. Vijandran Associates
For the plaintiff/ respondent - Maikal Yasu; (M/s. Maikal, Tana & Co.) with N. Shanmugam; (M/s. Shan, Gooi & Huang) and Tanasekharan Autherapady; (M/s. V.P. Nathan & Partners)

JUDGMENT

Mohamed Dzaiddin J:

(encl. 7)

This was an application by the defendants to discharge the interlocutory injunction which I granted *ex parte* against them on 23 May 1987 at the instance of the plaintiff.

In essence, the interim injunction restrained the defendants, their agents or servants from receiving any nomination papers in respect of the nomination of candidates for the Malaysian Indian Congress Penang Branch elections which was fixed on the same day when the order was granted. The injunction further restrained the defendants from holding the Penang State Congress election pending the declaration by this Court of the status of the Malaysian Indian Congress Tanjong West Branch, where by an indorsement on his writ of summons, the plaintiff prayed for a declaration that the said Tanjong West Branch was not a "defunct" branch by virtue of Article 20 of the Malaysian Indian Congress Constitution.

Due to the urgency of the matter, Messrs D.P. Vijandran Associates, solicitors for the defendants filed this summons on 27 May 1987 seeking this Court to hear the matter immediately. Mr. D.P. Vijandran, together with Datuk T. Subbiah appeared before me on the same morning seeking my indulgence to hear the matter *ex parte*. I then fixed the hearing in the afternoon where Counsel for the plaintiff were present. In fact they were aware that the defendant's Counsel were in the corridor of my Court armed with an *ex parte* summons that

morning. As the parties were present in the afternoon, I assumed that the application was made upon due notice given to the plaintiff's solicitors and Counsel were prepared to argue the defendant's application without filing any affidavit-in-reply. In my opinion, even if I was wrong in my assumption, based on the authority cited to me by Mr. Vijandran, I could in the circumstances of this application, hear it *ex parte*. In *London City Agency (JCD) Ltd. & Anor. v. Lee & Ors*. [1970] 1 Ch 597 the plaintiffs on an *ex parte* application were granted an interlocutory injunction restraining the defendants from parting with moneys in the bank until a certain date "or until further order in the meantime." The plaintiffs later gave notice of motion to the defendants for an injunction in similar terms "until further order". Before the day fixed for that hearing, the defendants applied to the Court *ex parte* by motion for an order to discharge or vary the injunction already granted. The matter came up for hearing before Megarry J. who decided, *inter alia*, on one point of practice, which is, whether an interlocutory injunction could be discharged or varied on an *ex parte* application. At p. 599 the learned Judge said:

> In my judgment the Court has ample jurisdiction to make such an order, and there is no established rule of practice to prevent the Court doing so in a proper case. I do not accept what is said in *Halsbury* as a correct statement of the present law. The Court will grant an interlocutory injunction on an *ex parte* application if a case of sufficient cogency is made, and no reason has been suggested why, if an application *ex parte* to discharge or vary such an injunction is supported by sufficiently cogent grounds, the Court should not do what is sought. If time permits, it is plainly preferable that any such application should be made upon due notice; but in a case of sufficient urgency, I do not see why an injunction granted *ex parte* should be immune from being varied or discharged upon an *ex parte* application. I cannot believe it to be the law that however clearly it has been established that it would be wrong for the injunction to continue in force unchanged. The Court is impotent to discharge or vary it until notice of motion has been given and has expired, especially where (as here) Counsel for those entitled to the injunction has in fact been present on the hearing of the *ex parte* application for the discharge or variation. Accordingly, in my judgment, the only question here is whether the applicants *ex parte* have made out a sufficient case for discharging or varying this injunction.

Turning now to the application proper, let me first deal with the preliminary objections raised on behalf of the plaintiff. Mr. N. Shanmugam, one of the Counsel for the plaintiff raised three issues, two of which related to the form rather than the substance of the summons-in-chambers. However the third objection concerned the standing of Mr. Vijandran, Counsel for the defendants in this matter. Counsel submitted that Mr. Vijandran has no *locus standi* as Counsel by virtue of his being gainfully employed as the Deputy Speaker of the Dewan Rakyat and under s. 30(3) of the Legal Profession Act 1976, he should surrender his practice certificate to the Registrar.

Now, **s. 30** provides:

> 30. **Disqualification for practising certificate.**
>
> (1) No advocate and solicitor shall apply for a practising certificate:
>
> (a) unless he is practising or intends to practise either on his own account or in partnership in Malaysia: or
>
> (b) unless he is or is about to be employed full time in his practice in Malaysia by an advocate and solicitor or a firm of advocates and solicitors in practice in Malaysia ; or
>
> (c) if he is gainfully employed by any other person, firm or body in a capacity other than as an advocate and solicitor.

(2) For the purpose of this section a qualified person shall not be construed as being gainfully employed if he is serving in the Judicial and Legal Service.

(3) Any qualified person who is gainfully employed in accordance with para. (c) of subsection (1) shall surrender his practising certificate to the Registrar.

Clearly, under s. 30(1)(c) no advocate and solicitor shall apply for a practising certificate if he is gainfully employed by any other person, firm or body in a capacity other than as an advocate and solicitor. However, in this case I did ascertain from Mr. Vijandran whether he possessed a valid practising certificate. He confirmed that he had. Therefore, on the strength of his practising certificate Mr. Vijandran has an exclusive right to appear and plead in this Court under s. 35(1) of the Act. On the question whether he is gainfully employed by virtue of being a Deputy Speaker, I think it is not disputed that as Deputy Speaker he is paid remuneration from the Consolidated Fund (Article 58 of the Federal Constitution). However, whereas under Article 57(1) of the Constitution a Speaker shall be disqualified from holding office if after three months of his election or at any time thereafter he becomes a member of any board of directors or board of managements, or an officer or employee, engages in affairs or business, of any organisation or body, whether corporate or otherwise, or any commercial, industrial or other undertaking, whether or not he receives any remuneration, reward or profit or benefit (provided of course such disqualification does not apply where such organisations carries out welfare or voluntary, or charitable or social nature and he does not receive any remuneration, reward or profit from it), there is no provision in the Constitution regarding the position of the Deputy Speaker. Thus, in my judgment, until the law is amended, so long as Mr. Vijandran is on the Roll of advocates and solicitors and is issued with or possesses a valid practising certificate, he has an exclusive right to appear and plead in all Courts in Malaysia. I may only comment that this is a matter for the Bar Council to look into.

On the main application the issue in the plaintiff's writ was whether the defendants were acting within the Party's Constitution when they declared the Malaysian Indian Congress Tanjong West Branch as "defunct" under Article 20. It was the plaintiff's contention that the said branch was wrongfully declared as "defunct" by the defendants and that the said declaration had deprived the plaintiff and other members of the Branch from utilising their rights and privileges given by the Party's Constitution. From the supporting affidavit of Datuk M. Mahalingam, the Party's Secretary General, the defendants have shown several grounds for the discharge of the injunction. One of the grounds was that the plaintiff had left out certain pertinent facts which were material to the issues before the Court. These facts related to the question of an alleged false membership in several Malaysian Indian Congress Branch Congresses in Penang. The Central Working Committee of the Malaysian Indian Congress carried out membership verification exercise to ascertain the truth if this allegation and discovered that 41 photocopies of the identity cards of the total members of 115 from the Tanjong West Branch were falsified, thus reducing the membership to 71. Under Article 19.12, the membership of the Branch Congress shall not be less than 100. In consequence thereof, the Central Working Committee sent a telegram to the said Branch stating its defunct position and that a letter would follow to explain the true position. In the meantime, the plaintiff chose to file a writ against the defendants for a declaration that the said Branch was not defunct, followed by this interim injunction. Further, Mr. Vijandran submitted that under Article 91 of the Party's Constitution the plaintiff was precluded from resorting to Court proceedings unless and until such matter was first referred to the Central Committee. According to Counsel, this condition precedent was not followed by the plaintiff in the first place. Article 91 reads as follows:

Court Proceedings:

> Every member shall be bound by the decision of the Central Working Committee in matters relating to his rights, obligations, duties and as a member of the Congress. If he resorts to Court proceedings in respect of his rights, obligations, duties and privileges or on behalf of any other member or in respect of the rendering of meaning of the provisions of this Constitution without first referring to the Central Working Committee or in violation of any decision or directive of the Central Working Committee, he shall *ipso facto* cease to be a member of the Congress and shall not be entitled to exercise any of the rights of a member.

This article is in *para materia* with the former Article 15(4) of the said Constitution which was dealt with by the Federal Court in *Datuk Pasamanickam & Anor. v. Agnes Joseph* [1980] 2 MLJ 92. In that case the respondent sought a declaration that the annual general meeting of the Parit Bakar branch of the Malaysian Indian Congress held in March 1979 was unconstitutional and unlawful and therefore ineffective, null and void. The appellant's appeal against the decision was allowed by the Federal Court. Raja Azlan Shah CJ (Malaya) (as he then was) delivering the judgment of the Court stated at p. 95 as follows:

> It is trite law that the relationship between the Malaysian Indian Congress (a registered society under the Societies Act) and its members is based on contract and the terms of the contract as embodied in the Malaysian Indian Congress Constitution will *prima facie* be binding on the parties. Article 15(4) of the said Constitution impliedly forbids members from resorting to Court proceedings in matters relating to their rights, obligations, duties and privileges unless and until such matters are first referred to the Central Working Committee. The said article reads as follows:
>
> ...
> ...
> ...
> ...
>
> ... In the present case Article 15(4) provides as a first step that reference to the Central Working Committee is a condition precedent before resorting to Court proceedings. The effect of this is that a member is not excluded from going to Court but must first refer the matter to the domestic forum. It has been held in *Scott v. Avery, supra,* that such a clause is legitimate and not contrary to public policy. The effect of the decision is that an agreement that no right of action shall arise by action in the Courts unless and until the parties' differences have been settled in some other way, for example by arbitration, is not void as being an ouster of the jurisdiction of the Courts. See also *10 Halsbury's* (4th Edn.) 326-327, para. 719.

In the circumstances of the whole case, I found the defendants had made a sufficient case for me to discharge this interim injunction. I therefore made an order in terms of paras. (a) and (c) of the defendant's application. Damages, if any, to be assessed by the Registrar. As for costs, in view of further hearing of prayer (b) whereby the defendants had applied to strike out the plaintiff's writ under O. 18 r. 19 Rules of the High Court, I ordered the costs of the present application to be costs in the cause.

Also found at [1988] 1 CLJ 367